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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDDIE DWAYNE LEWIS et al., Defendants and Appellants.	B226839 (Los Angeles County Super. Ct. No. TA098877)

APPEAL from judgments of the Superior Court of Los Angeles County, Eleanor Hunger, Judge. Affirmed and remanded with directions.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant Eddie Dwayne Lewis.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant Jamillion Brown.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant Boris Goodloe.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Eddie Dwayne Lewis, Jamillion Brown and Boris Goodloe, appeal the judgments entered following their convictions for premeditated attempted murder, shooting from a motor vehicle, and the unlawful taking or driving of a motor vehicle (Goodloe only), with firearm and gang enhancements (Pen. Code, §§ 664/187, 12034, subd. (c), 12022.53, 186.22; Veh. Code, § 10851).[1] The defendants were sentenced to state prison as follows: 35 years to life (Lewis and Brown); 40 years to life (Goodloe).

This matter is remanded for resentencing and, in all other respects, the judgments are affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The shooting.*

A week prior to June 1, 2008, someone stole Juan Padilla's burgundy Camry.

On June 1, 2008, Sherry F. was living at the Stanford Avenue Apartments across from Campanella Park. That day, she was inside her apartment with her 19-year-old son Laurence, her five-year-old daughter, and her cousin Jeanette. Laurence left the apartment at one point and shortly thereafter Sherry heard gunshots. Going to the front door, she saw Laurence lying on the ground and a man standing over him with a gun. The man shot at Laurence. The man was wearing a black hooded sweatshirt with the hood up and Sherry could not see his face. After shooting Laurence, the man entered the rear passenger side of a burgundy Camry which drove off. Sherry ran to Laurence, who was bleeding from the neck.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

After hearing the gunshots, Jeanette went to the doorway, grabbed Sherry's daughter and brought her back into the apartment. From one of the apartment windows, Jeanette saw three African-American men inside a burgundy Camry; one was in the driver's seat, one was leaning out the front passenger window, and one was leaning out the rear passenger window. The rear passenger was holding a large gun. Jeanette heard five or more gunshots coming from the passenger side of the car. She did not see anyone get out of the car.

A neighbor gave Laurence a ride to the hospital and he survived the shooting.

b. *The apprehension*.

Deputies Samuel Orozco and Claudia Rodriguera of the Los Angeles County Sheriff's Department immediately responded to the shooting scene. Within minutes of arriving, they heard a radio transmission saying the Camry had been spotted.

Deputy Sheriff Angel Grandes and his partner were riding in a patrol car. On 120th Street, near Compton Avenue, they passed a burgundy Toyota Camry with three occupants. This location was a five or ten minute drive from the shooting scene. The Camry's occupants peered at the deputies. Then, after the cars had passed each other, the rear passenger turned around to look back at the patrol car. Grandes ran a check on the Camry's license plate and discovered the car had been stolen. The patrol car began to follow the Camry, which accelerated and then crashed at the corner of 123rd and Compton. All three occupants jumped out. Grandes was only about 10 feet from the Camry and he got a good look at the occupants. He identified defendant Goodloe as the driver, defendant Lewis as the front seat passenger, and defendant Brown as the rear seat passenger. Lewis and Brown ran south on Compton, while Goodloe ran east on 123rd Street.

Following department policy dictating that they stay together, Grandes and his partner ran after Goodloe while summoning assistance by radio. While following Goodloe, Grandes lost sight of Brown and Lewis. Goodloe ran through several residential yards. During this chase, Grandes spotted Brown standing on the porch of a house on 124th Street, knocking on the door and yelling,

"Help me, help me." Grandes then took his eyes off Goodloe and turned his attention to Brown and also to Lewis who was hiding under a nearby bush. Brown and Lewis were apprehended. Subsequently, following a citizen's tip, Goodloe was discovered hiding behind a residential fence on 124th Street, just four or five houses from where Brown and Lewis had been caught.

c. *Forensic evidence.*

Inside the crashed Camry, police found a Calico nine-millimeter semiautomatic rifle on the front passenger seat, a Cincinnati Reds cap between the two front seats, and some nine-millimeter bullet casings on the floor. There was a second gun, a nine-millimeter Taurus handgun, on the right rear passenger seat and a magazine for that gun under the driver's seat. There was a shaved key in the ignition, a pair of dark blue athletic shorts on the car's hood, and a pair of black tennis shoes on the ground near the car.

The defendants' hands were tested for gunshot residue. Joseph Cavaleri of the Sheriff's Department Scientific Services Bureau opined there was gunshot residue on each defendant, which indicated each defendant could have fired a gun, handled a gun, been next to someone who fired a gun, or touched a surface contaminated with gunshot residue particles. Due to the minimal amount of gunshot residue on Goodloe, Cavaleri could not rule out possible environmental or occupational sources; one of the particles found on Goodloe could have come from a motorcycle battery.

The bullet casings found inside the Camry had been fired from the two guns found in the car. Bullet casings found at the shooting scene also had been fired from the same two guns.

d. *Gang evidence.*

The evidence showed all three defendants were members of the Swamp Crips gang.

Sergeant Frederick Reynolds of the Los Angeles County Sheriff's Department testified as a gang expert. As of 2010, there were 70 documented

members of the Swamp Crips gang. Their territory was within Compton, and they frequented Tarrant Street and 157th Street. The gang originated in the 1970s and its name refers to a marsh area which then existed in Compton. The gang favored the color green and celebrated St. Patrick's Day as their "hood day." The gang's primary activities included shootings, carrying illegal guns, selling drugs and committing burglaries. They had many enemies, including the Campanella Park Piru gang.

"Putting in work" means committing assaults and drive-by shootings against rival gang members. These activities increase the stature of the gang and its members, and generate fear in the community; as a result, the gang's crimes are less frequently reported and people are more reluctant to testify against them. Witnesses and victims often came to court intending to testify, but then recanted their prior statements or failed to identify perpetrators for fear of being accused of snitching. Snitches risked being assaulted or killed.

Given a hypothetical based on the facts of this case, Reynolds opined Laurence's shooting had been gang-related: "[B]y going to . . . a known rival gang area, in a stolen car, armed as they were, and shooting an individual in that rival gang neighborhood, there's no question that this was a gang-motivated shooting done to benefit the assaulting gang." The Cincinnati Reds cap, bearing the letter "C," was the type of cap worn by Campanella Park Piru gang members to identify themselves and it would have served as a kind of Trojan horse, allowing the defendants to penetrate deeper into rival gang territory without arousing suspicion.

2. *Defense evidence.*

a. *Evidence presented by Goodloe.*

Goodloe's mother was aware that members of the Swamp Crips gang lived in the neighborhood, and that Brown and Lewis were Goodloe's long-time friends. She testified Goodloe's grandfather had been teaching him to repair engines and that Goodloe worked on his motorcycle every day.

b. *Evidence presented by Brown.*

When the defendants were booked at the Sheriff's Department on the day of the shooting, they were each wearing a black shirt and red shorts; no one was wearing a black hooded sweatshirt.

Laurence's testimony from the first trial was read to the jury. His mother's apartment complex was located across the street from Campanella Park. The park was controlled by the Campanella Park Piru gang, with whose members Laurence associated. Laurence testified he was not a member of the gang, but was "just affiliated" with it. The difference was that "affiliated is when you just hang out and party with them," whereas if "[y]ou become a gang member that's when you commit crimes with them." On the other end of the spectrum, a "nonaffiliate is someone that doesn't even hang with a gang member at all."

On the day of the shooting, Laurence's shoelaces were red, a color often associated with the Campanella Park Piru gang. He left his mother's apartment and was standing outside on the grass talking to a friend. Although Laurence noticed a car pulling up in the street, he did not pay any attention to it at first. But then, seeing the look on his friend's face, Laurence turned and dropped to the ground. Shots were fired and he felt a bullet strike the back of his neck. Laurence was lying face down on the ground. A man exited the car, ran toward him, and there followed a second series of gunshots. Two bullets grazed Laurence's back. The man returned to the car and it drove off. When this gunman approached him, Laurence's "attention was focused on his face" and he remembered what the man looked like. Laurence did not see that man in the courtroom now. Laurence testified this gunman was not one of the defendants.

Laurence acknowledged that when he spoke with the police, he did not tell them he could identify the man who had walked over and shot him. He told the police he did not want to come to court, but that was not because he was afraid of being labeled a snitch; rather, it was because he had not seen anything. However, Laurence also acknowledged that acquiring a snitch label would be

dangerous for him because "[i]f you're gang affiliated, then having a snitch jacket on you is . . . something that can get you killed . . . ."

c. *Evidence presented by Lewis.*

Dr. Mickey Kolodny, the emergency room physician who treated Laurence, testified the bullet that hit his neck was not life-threatening.

CONTENTIONS

1. There was insufficient evidence to sustain the convictions of Brown and Goodloe.

2. All the convictions must be reversed because vital evidence from the first trial was not presented at the second trial.

3. The trial court miscalculated defendants' presentence custody credits.

4. The trial court improperly imposed a Government Code section 76104.7 DNA assessment.

5. [By the Attorney General] The trial court erroneously imposed only single Government Code section 70373 and Penal Code section 1465.8 assessments.

6. A clerical error in the abstract of judgment must be corrected.

DISCUSSION

1. *There was sufficient evidence to sustain the convictions.*

Defendants Brown and Goodloe contend their convictions must be reversed because there was insufficient evidence to prove they were the perpetrators. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the

reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

b. *Discussion*.

Defendants' argument essentially consists of cherry picking exculpatory bits of trial evidence and then arguing this evidence would have led a reasonable jury to acquit them. For instance, Brown argues "[t]he clothing described by the witnesses to the shooting did not match the clothing seized from appellants at the time of their arrest," and goes on to assert that "[t]he relevant inquiry becomes whether appellants running from the police and the finding of some gunshot residue particles on their person is enough to sustain the convictions." But as the Attorney General properly notes: "Brown essentially argues that these . . . two points constitute the only evidence supporting his convictions. He is mistaken."

"In a case built solely on circumstantial evidence, none of the individual pieces of evidence 'alone' is sufficient to convict. The sufficiency of the individual components, however, is not the test on appeal." (*People v. Daya* (1994) 29 Cal.App.4th 697, 708; see, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 68 [strong evidence of motive together with opportunity and other circumstantial evidence was sufficient to prove defendant killed victim]; *People v. Thomas* (1992) 2 Cal.4th 489,

514-516 [evidence showed defendant had opportunity and means to commit murders, and there was significant consciousness of guilt evidence]; *People v. Daya, supra*, at p. 710 [motive and opportunity evidence together with "blatantly incriminatory" consciousness of guilt evidence supported murder verdict].)

The circumstantial evidence in this case was overwhelming. Grandes identified the defendants as the three men who had been riding in the Camry. Forensic examination of the bullet casings proved the shots fired at Laurence had come from the two guns found inside the Camry. The defendants were discovered in the Camry within five or ten minutes after Laurence had been shot, at a location that was five or ten minutes away from the shooting scene, and they sped off after seeing the patrol car. When the Camry crashed, all three defendants took off running in an obvious attempt to evade capture. Defendants belonged to the Swamp Crips gang and the shooting occurred in the territory of their rival, the Campanella Park Piru gang. Defendants drove a stolen car, brought along a decoy baseball cap to avoid detection in enemy gang territory, and shot at someone wearing Campanella Park colors. Defendants had gunshot residue on their hands.

Laurence's testimony identifying a fourth person as the gunman who walked over and shot him was not particularly credible in light of the evidence he feared gang retaliation if he "snitched." The difference in clothing was accounted for by Grandes's testimony that, at different times, each of the defendants disappeared from sight during the foot chase. It would be reasonable to conclude, for instance, that during these interludes the defendants stripped off and discarded the clothing they had originally been wearing, leaving the black T-shirts and red shorts they had on when arrested.

There was more than sufficient evidence to sustain these convictions.

2. *Failure to present vital evidence at second trial.*

Defendants' first trial ended in a hung jury. They now contend their convictions must be reversed because vital evidence from their first trial was either not presented, or not presented effectively, at the retrial. We conclude, however, there is no need to reverse defendants' convictions because they cannot show that any of the alleged errors was prejudicial.

a. *Background.*

Although Laurence and Reginald Bennett testified for the People at the first trial, the prosecution declined to call them as witnesses at the retrial. The trial court allowed the defense to read Laurence's prior testimony to the jury after ruling he was legally unavailable. However, the trial court excluded Bennett's prior testimony on the ground he had not been properly served with a defense subpoena and, therefore, he was not legally unavailable.

On appeal, defendants raise a series of claims predicated on the fact the retrial jury did not hear live testimony from Laurence and did not hear any testimony from Bennett. Defendants contend: the trial court erred by ruling Bennett had not been properly served; defense counsel rendered ineffective assistance by not procuring the missing testimony; and, the trial court should have remedied this situation by ordering a new trial. We conclude defendants are not entitled to relief on any of these claims because they have failed to demonstrate there was any resulting prejudice.

b. *The failed attempt to subpoena Bennett.*

The defense tried to serve a subpoena on Bennett to obtain his testimony at the retrial. When Bennett failed to appear in court as expected, the trial court held a due diligence hearing to decide whether to admit his prior testimony.

Shanee Blue, an employee of a private investigation firm, testified she went to the Stanford Avenue Apartments to serve a witness subpoena on Bennett. She knocked on the door several times, but no one answered. When a neighbor came out of an adjacent apartment, Blue asked him if "Reggie" were home. The neighbor said

"he should be," walked down some steps, and pointed to a car. The neighbor then yelled "Reg" and someone answered "Yeah." However, when the neighbor said someone was looking for him, there was no further response from this other person. Blue went back upstairs and knocked on the apartment door again. After several minutes, a man opened a window, responded to the name "Reggie," but refused to accept the subpoena. Blue "stuck the subpoena in the door and . . . said, 'Well, it doesn't matter. You've been served anyway to appear in court.' " She then left the apartment complex. When she returned the next day, the subpoena was no longer in the door.

Blue acknowledged she had no idea what Reginald Bennett looked like before she went to the Stanford Avenue Apartments that day. She testified she believed the person she had left the subpoena with was Bennett "because the . . . neighbor had called him and he did answer to Reg," and when "he came to the window [and] I said 'Reggie,' he said, "How can I help you."

The trial court ruled the subpoena had not been properly served and, therefore, the defense had failed to show Bennett was an unavailable witness. The trial court reasoned that, because no one knew how many people were inside the apartment at the time, there was no evidence the person who answered the neighbor's call was the same person with whom Blue subsequently spoke. When the trial court pointed out, "We don't know if it was the same person who came to the window," defense counsel replied: "I would agree with you that no one knows . . . the number of people that were inside that apartment." The trial court also said that, because Blue never asked the man who opened the kitchen window if he were Reginald Bennett, "there was no self-identification."

Evidence Code section 1291 provides that evidence of prior recorded testimony constitutes a hearsay exception if the declarant is unavailable to testify at trial, and if the party against whom the evidence is offered had the opportunity to cross-examine the declarant with a trial-level interest and motivation. (*People v. Samayoa* (1997) 15 Cal.4th 795, 849; *People v. Zapien* (1993) 4 Cal.4th 929, 975.)

"A person is 'unavailable as a witness' within the meaning of Evidence Code section 1291 if he or she is '[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.' (Evid. Code, § 240, subd. (a)(5).) The proponent of the evidence . . . has the burden of establishing unavailability by competent evidence." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1296.) "Unavailability of a witness is a preliminary fact to be established to the satisfaction of the trial court by the proponent of the evidence [citations]." (*People v. Sul* (1981) 122 Cal.App.3d 355, 361.)

Section 1328, subdivision (a) provides that "service [of a subpoena] is made by delivering a copy of the subpoena to the witness personally." Citing *Trujillo v. Trujillo* (1945) 71 Cal.App.2d 257, Lewis argues: "The manner in which [Bennett] was served is valid. He was told he was being served and that he had to come to court. He would not open his door. Placing the subpoena in the door was proper in that the witness refused to take it." This argument misses the point. There was no identification problem in *Trujillo*, whereas here the trial court concluded there was insufficient evidence the person served was, in fact, Reginald Bennett. Blue did not have a physical description and she never asked the man if his name was Reginald Bennett. Nor did Blue testify that, when speaking with the neighbor, she ever used the name Bennett. And although Blue testified she announced she was serving a subpoena in a court case, there is no indication she identified the case as the one involving the drive-by shooting of Laurence.

Defendants have not provided this court with any authority holding that, in circumstances such as these, the trial court was required to assume the man Blue spoke to was Reginald Bennett. In any event, as discussed *post*, even if the trial court erred by disallowing Bennett's prior testimony, defendants cannot show there was any resulting prejudice. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 956 [even if trial court erred by quashing defendant's discovery subpoena, "there is no reasonable probability a different result would have occurred . . . had the evidence

been disclosed to the defense"]: *People v. Cudjo* (1993) 6 Cal.4th 585, 613 [although trial court erred by excluding evidence that third person had confessed to the murder, there was no reasonable probability this evidence would have affected trial outcome because prosecution case was strong and purported confession "had obvious indicia of unreliability"]; *People v. Garcia* (2008) 160 Cal.App.4th 124, 133-134 [trial court's error in requiring service of subpoena on prisoner as prerequisite to removal order was harmless under *Watson*[2]].)

c. *Defendants were not prejudiced by missing evidence.*

Just as the trial court's alleged error in finding Bennett had not been properly served might not have been prejudicial, harmless error is an essential part of any ineffective assistance of counsel claim. Such a claim has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness. [Citation.] To establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [146 L.Ed.2d 389].) However, " 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 136; see, e.g., *People v. Dunn*

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[2] *People v. Watson* (1956) 46 Cal.2d 818, 836.

(2012) 205 Cal.App.4th 1086, 1101 ["even if counsel were deficient in not serving [expert witness] with a subpoena to appear at trial, it is not reasonably probable the jury would have had a reasonable doubt about [defendant's] guilt"].)

Defendants argue that here the missing testimony[3] was crucial to their case and its loss at the retrial caused them to be convicted. We disagree for three reasons.

First, the jury was not completely deprived of all the evidence tending to show the gunman who walked over to shoot at Laurence was not one of the defendants. That is because Laurence's prior testimony was read to the jury at the retrial. Although Goodloe cites case law to support his assertion that "[c]ourts have long recognized the advantage of live testimony over prior testimony," that case law concerns a defendant's confrontation clause right to have the jury look prosecution witnesses in the face.[4] Here, of course, the evidence was exculpatory and the defendants' confrontation clause rights were not at issue.

Second, defendants mistakenly claim the missing evidence would have completely exonerated them. For example, Lewis asserts: "Both of these witnesses were adamant in their denials that any of the three defendants were involved in the

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[3] To reiterate, defendants' claims are predicated on the assertion they were prejudiced by the absence of Laurence's live testimony, and by the absence of any evidence whatsoever from Bennett.

[4] Goodloe cites *People v. Cogswell* (2010) 48 Cal.4th 467, 476-477: "In requiring that prior testimony be admissible at trial only when the person who previously testified has later become unavailable to testify, the Legislature sought to ensure that 'only when necessary' is prior testimony to be substituted for live testimony, which is generally 'the preferred form of evidence.' [Citation.] Live testimony compels a witness 'to stand face to face with the jury' so it 'may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' [Citation.] But that assessment by the jury ' "is severely hampered" ' when the ' "witness is absent and when his prior testimony is read into evidence. [Citation.] Only if the necessity . . . is clearly demonstrated may the defendant's right of confrontation be overcome . . . ." ' [Citation.]"

shooting," and "At appellant's second trial, appellant's jury did not know that not one, but two eyewitnesses were positive that the defendants were not involved." Similarly, Goodloe asserts: "[B]oth witnesses were percipient witnesses who would have testified that Goodloe was not involved in the crime. If believed by the jury, this evidence would conclusively show Goodloe's innocence because both witnesses testified in the first trial that Goodloe was not there." But these assertions are unwarranted because neither Laurence nor Bennett purported to have seen *all* the perpetrators. Indeed, neither witness even purported to have seen both gunmen. Rather, Bennett and Laurence merely claimed the single perpetrator they had seen was not one of the people on trial. Hence, their testimony would not have exonerated all the defendants.

Third, even as to the identity of the gunman who stood over Laurence and shot at him, the record shows Bennett suffered from such "obvious indicia of unreliability" (*People v. Cudjo, supra,* 6 Cal.4th at p. 613), that the absence of his testimony was not prejudicial.

At the first trial, Bennett testified he looked out the window from his second-floor apartment at the Stanford Avenue apartment complex after hearing the sound of firecrackers. He saw a car stopped in the street. However, there was a truck blocking his view of all but the very rear of the car. He saw a tall African-American man enter the car on the passenger side. This "darker-looking gentleman" was not one of the defendants. The car then drove south on Stanford Avenue. Bennett did not see anyone hanging out of the car.

Bennett testified he ran to his own vehicle because he wanted to follow the car. But when he could not locate it, he drove back to the apartment complex. There he saw two deputies talking with Sherry. Bennett either showed or gave one of the deputies the partial license plate number he had written down. He did not tell them that he himself had seen the license plate; in fact, he couldn't see the license plate from his apartment. He did not tell them he had actually witnessed the shooting. He did not see any people or guns hanging out the car's windows. He denied telling

the deputies he had heard gunshots, or that he had seen an African-American man "standing at the rear driver's side window . . . [and] firing several rounds from a black rifle which looked like a tommy gun."

To impeach Bennett, the prosecution called Deputy Robert Furman, who testified Bennett handed him a piece of paper with a license number written on it. Bennett told Furman "he had witnessed the incident." Bennett indicated it started when he heard gunshots and he used the word "gunshots." Bennett told Furman he saw an African-American man "standing in the vehicle up through the rear window facing northbound as the vehicle was proceeding southbound. [¶] And that individual was shooting from a black gun that appeared to be . . . a tommy gun." Bennett used the words "tommy gun."

In addition to these direct contradictions, Bennett's testimony was inconsistent regarding his opportunity to observe what happened and how sure he was about what he claimed to have seen. At the beginning of the prosecutor's direct examination, the following colloquy occurred:

"Q. *Did you see anything in regard to the shooting*?

"A. *No*.

"Q. *So you didn't tell the deputies that you, in fact, witnessed the shooting*?

"A. *I didn't witness the shooting. No, I didn't*." (Italics added.)

Regarding the man he saw enter the car:

"Q. Did you see anything in his hands?

"A. I don't know.

"Q. Did you see any other weapons or individuals . . . hanging out of the car window?

"A. No. It just happened in a second . . . ."

And this:

"Q. *Now, would it be fair to say that you really focused on that individual*?

"A. *No, I didn't have time to focus on them*. I was just trying to . . . grab my keys. And somebody was hollering out. I have to grab a pen real fast, you know. So I didn't have time to focus." (Italics added.)

Hence, Bennett's testimony contained so many contradictions, inconsistencies and disavowals that its credibility was questionable. In any case, it was certainly not powerful exculpatory testimony and, as we have discussed *ante*, there was overwhelming circumstantial evidence showing the defendants were guilty.

In sum, we conclude defendants have failed to demonstrate there was any resulting prejudice from the missing testimony.

3. *Presentence custody credits were not awarded.*

Defendants contend the trial court erred by failing to award them any presentence custody credits. The Attorney General agrees, acknowledging the trial court noted defendants had spent pretrial time in custody, but then failed to award any good time credits.[5]

"A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647 ["We shall award defendant 390 days of presentence custody credit and shall direct the trial court to prepare a corrected abstract of judgment showing this award."].)

We will remand so the trial court can calculate the appropriate presentence custody credits.

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[5] According to the abstracts of judgment, the trial court credited each defendant with 804 days actual custody, but no days at all of good time credit. Of course, defendants may not be entitled to *full* presentence custody credits as various statutes restrict the award based on the offense committed and the defendants' criminal history.

4. *Improper imposition of DNA assessments*.

At sentencing, the trial court ordered each defendant to pay a $30 court security fee (§ 1465.8), a $30 criminal conviction assessment (Gov. Code, § 70373, subd. (b)), and a $200 restitution fine (§ 1202.4, subd. (b)). The court also imposed, but stayed, a $200 parole revocation fine (§ 1202.45). In addition to these fees and assessments, the trial court ordered each defendant to pay a $20 DNA penalty assessment under Government Code section 76104.7. Defendants contend this DNA assessment was erroneous and the Attorney General concedes this claim has merit.

The DNA assessment was improper for two reasons. First, the DNA state-only penalty assessment under Government Code section 76104.7 can only be imposed in addition to an assessment under Government Code section 76104.6,[6] and here the trial court did not impose a DNA penalty assessment pursuant to Government Code section 76104.6. Second, there was no fine, penalty, or forfeiture imposed which could have supported a DNA penalty assessment under either Government Code section 76104.6 or 76104.7. That is because the statutes authorizing the restitution, court security fee, criminal conviction assessment and parole revocation fine penalties each contain language indicating the DNA assessments do not apply to them.[7]

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[6] Government Code section 76104.7, subdivision (a), states: "Except as otherwise provided in this section, in addition to the penalty levied pursuant to Section 76104.6, there shall be levied an additional state-only penalty of three dollars ($3) for every ten dollars ($10), . . . in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ."

[7] (See section 1202.4, subd. (e) ["The restitution fine shall not be subject to penalty assessments authorized in . . . Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code"]; section 1465.8, subd. (b) ["The penalties authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code . . . do not apply to this assessment."]; Government Code section 70373, subd. (b) ["The penalties authorized by Chapter 12 (commencing with Section 76000) . . . do not apply to this assessment."]; section 1202.45 ["parole revocation restitution fine shall not be subject to penalty assessments

The DNA assessment must be vacated.

5. *Trial court erred by failing to impose multiple assessments.*

The Attorney General contends the trial court erred by failing to impose *multiple* assessments under section 1465.8 and Government Code section 70373 to correspond to the number of convictions suffered by each defendant. This claim has merit.

The court facilities assessment (Gov. Code, § 70373) and the court security fee (§ 1465.8) "are mandatory." (*People v. Woods* (2010) 191 Cal.App.4th 269, 272.) Section 1465.8, subdivision (a)(1) provides for a fee to "be imposed on every conviction for a criminal offense . . . ." Government Code section 70373, subdivision (a)(1) provides for an assessment to "be imposed . . . for each misdemeanor or felony . . . ." These fees are to be imposed once for each conviction. (See *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3 [regarding Gov. Code., § 70373]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865 [regarding § 1465.8].)

Here, the trial court erred by imposing only one court facilities assessment and one court security fee per defendant despite the fact defendants Lewis and Brown each sustained two convictions, and defendant Goodloe sustained three convictions. We will remand so the trial court can correct this error.

6. *Correct abstract of judgment.*

The defendants contend, and the Attorney General agrees, the abstracts of judgment for all three defendants must be amended to correctly reflect their convictions on count 2 as having been for the offense of shooting from a motor vehicle (§ 12034), not conspiracy (§ 182). These clerical errors must be corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [it is proper and important to correct errors and omissions in abstracts of judgment].)

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authorized by . . . Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code"].)

DISPOSITION

This matter is remanded to the trial court for resentencing in accordance with this opinion. In all other respects, the judgments are affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.